

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 17, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-0837

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL CRUZ,

Defendant-Appellant.

APPEAL from an order of the circuit court for Kenosha County:
RICHARD G. HARVEY, JR., Reserve Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Michael Cruz appeals from an order denying his § 974.06, STATS., motion for postconviction relief. While the appeal was being briefed, our supreme court decided *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994). Because the ineffective assistance of trial counsel claim Cruz raised in his § 974.06 motion was not raised in his direct appeal, Cruz moved this court to remand to the circuit court to determine whether he had a sufficient reason as required by *Escalona* for not having raised the issue in his direct appeal. We construed the court's decision on remand as a finding that

Cruz had a sufficient reason for not raising his ineffective assistance of trial counsel claim in his direct appeal.

On appeal, the parties address: (1) whether Cruz had a sufficient reason under *Escalona* for not having raised his ineffective assistance of trial counsel claim in his direct appeal and (2) whether trial counsel was in fact ineffective for failing to ensure that Cruz understood the trial court proceedings in light of his hearing loss and language and comprehension difficulties.

Because the trial court's finding that Cruz had a sufficient reason for not having raised his ineffective assistance of trial counsel claim on direct appeal is supported by the *Escalona* record, we will reach the merits of his § 974.06, STATS., motion. We agree with the trial court that Cruz's trial counsel effectively responded to Cruz's various impairments. Accordingly, we affirm the order denying Cruz's § 974.06 motion.

In November 1987, we affirmed Cruz's conviction for first-degree homicide, as party to the crime, and aggravated battery.¹ Cruz challenged evidentiary rulings, the sufficiency of the evidence to establish intent for purposes of submitting a first-degree homicide charge to the jury, and the first-degree homicide, party to a crime, jury instruction. We affirmed the conviction.

In January 1992, Cruz, with the assistance of counsel, filed a § 974.06, STATS., motion alleging that he did not fully comprehend the trial court proceedings as a result of his hearing loss, difficulties in comprehending English and Spanish, language development and various communication problems and that his trial counsel was ineffective in the manner in which she responded to these impairments. In September 1992, the trial court held a multi-day *Machmer*² hearing on the question of trial counsel's effectiveness. In its decision denying Cruz's motion, the court found that trial counsel performed effectively. Cruz appealed from that decision, and we remanded for *Escalona* proceedings. Those proceedings addressed whether appellate counsel was

¹ *State v. Cruz*, No. 87-0071-CR, unpublished slip op. (Wis. Ct. App. Nov. 4, 1987).

² *State v. Machmer*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

ineffective for failing to raise this issue in Cruz's appeal from the judgment of conviction.

Under *Escalona*, a defendant who raises in a § 974.06, STATS., motion an issue which could have been raised on direct appeal must demonstrate a sufficient reason for not having done so before being allowed to do so in a § 974.06 motion. *Escalona*, 185 Wis.2d at 184-86, 517 N.W.2d at 163-64. The State argues that Cruz has not shown a sufficient reason for failing to raise his ineffective assistance of trial counsel claim in his direct appeal because he has not shown that he was prejudiced by appellate counsel's failure to do so. The State also argues that an ineffective assistance of appellate counsel claim should have been raised in a habeas corpus petition filed under *State v. Knight*, 168 Wis.2d 509, 484 N.W.2d 540 (1992).

We decline the State's invitation to address whether, when the alleged sufficient reason is ineffective assistance of appellate counsel, such needs to be pursued by way of a *Knight* petition. Additionally, we decline to address the State's argument that Cruz had to demonstrate prejudice as well as deficient performance of appellate counsel to establish a sufficient reason because the State did not raise this issue when Cruz requested a remand for an evidentiary hearing and only alluded to it during argument at the close of the *Escalona* proceedings.³ We decline to address this argument after proceedings on remand have concluded.

The *Escalona* court did not define "sufficient reason." However, our supreme court's concern with finality in litigation, including criminal cases, "demands that delay not be excused unless there is a legitimate reason that excuses the delay." *State v. Kazee*, 192 Wis.2d 213, 223, 531 N.W.2d 332, 336 (Ct. App. 1995) (citing the sufficient reason standard of § 974.06(4), STATS., as applied in *Escalona*).

³ Additionally, the parties' post-*Escalona* proceeding briefs are not included in the record on appeal to demonstrate that the State raised this issue in the trial court. Generally, we do not decide issues raised for the first time on appeal, *see Sears v. State*, 94 Wis.2d 128, 140, 287 N.W.2d 785, 790-91 (1980), and we decline to depart from that practice in this case.

After the *Escalona* hearing, the trial court adopted Cruz's proposed findings of fact that his original appellate counsel did not investigate whether he understood the trial court proceedings. The court found that had appellate counsel met with Cruz (in lieu of conferring over the telephone through a social worker acting as an interpreter), he would have discerned Cruz's various disabilities and comprehension problems and been prompted to investigate whether Cruz understood the trial court proceedings. Based upon the record of the *Escalona* hearing, we conclude that these findings are not clearly erroneous, *see* § 805.17(2), STATS., and that Cruz demonstrated a sufficient reason for not challenging trial counsel's assistance in his direct appeal.

We turn to the merits of Cruz's § 974.06, STATS., motion: whether trial counsel was ineffective for failing to ensure that Cruz understood the trial court proceedings. To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.*

Trial counsel's representation must be equivalent to that which the ordinarily prudent attorney, skilled and versed in criminal law, would give to clients who had privately retained his or her services. *State v. Harper*, 57 Wis.2d 543, 557, 205 N.W.2d 1, 9 (1973). In applying the "prudent-lawyer" standard, we consider if trial counsel's decisions were based on the law and the facts as they existed when trial counsel's conduct occurred and upon which an ordinarily prudent lawyer would have then relied. *See State v. Felton*, 110 Wis.2d 485, 502-03, 329 N.W.2d 161, 169 (1983). Trial counsel's duty was to make a reasonable investigation. *State v. Hubert*, 181 Wis.2d 333, 343-44, 510 N.W.2d 799, 803 (Ct. App. 1993) (citing *Strickland*, 466 U.S. at 691).

Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). The case is reviewed from counsel's perspective at the time of trial, and the burden is placed upon the defendant to overcome a strong presumption that

counsel acted reasonably within professional norms. *Id.* at 127, 449 N.W.2d at 847-48.

The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact. *State ex rel. Flores v. State*, 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. *Knight*, 168 Wis.2d at 514 n.2, 484 N.W.2d at 541. However, the final determination of whether counsel's performance was deficient is a question of law which this court decides without deference to the trial court. *See id.* If counsel's performance was not deficient, we need not consider the prejudice prong of the *Strickland* test. *See Strickland*, 466 U.S. at 697 (appellate court can address the two components in any order it chooses).

In analyzing whether trial counsel performed deficiently, we start with the fact that Cruz was tried in 1983. We review the case from counsel's perspective at the time of trial. *Johnson*, 153 Wis.2d at 127, 449 N.W.2d at 847-48. After the *Machner* hearing, the trial court made the following findings of fact regarding trial counsel's conduct and strategy. Cruz speaks a "Tex-Mex" Spanish dialect. Trial counsel spoke Spanish fluently and was experienced in criminal defense but had difficulty communicating with Cruz due to Cruz's hearing loss and language deficiency. Aware of these difficulties, trial counsel sought a competency evaluation to determine whether Cruz suffered from any mental disease or defect which would preclude a fair trial. The results of the competency examination revealed that Cruz did not suffer from such a defect. However, the evaluations did reflect his education, hearing and comprehension deficits.

It was undisputed that trial counsel employed three to four different interpreters before she decided that Frances Lopez was able to communicate most effectively with Cruz. Trial counsel prepared Cruz to testify at trial by reviewing questions and answers with him so that he would be familiar with and understand her examination. Additionally, trial counsel had Lopez read to Cruz translations of police reports and statements of the State's witnesses. The court found that the quality of trial counsel's representation was exceedingly high.

While Cruz testified at the § 974.06, STATS., motion hearing that he did not understand his trial counsel's Spanish and much of Lopez's translation during trial, the trial court found that Cruz's comprehension at trial exceeded the level he claimed nine years later. The court found that Cruz's trial testimony was much clearer and more responsive than that which he gave at the postconviction motion hearing.

These findings are not clearly erroneous in light of the evidence adduced at the postconviction motion hearing. Trial counsel was aware of Cruz's weaknesses in the areas of education, language development and speech, communication and comprehension, and his documented hearing loss. She recognized the need to procure an interpreter who could work with Cruz and finally settled upon Lopez as the interpreter most likely to understand and be able to communicate with Cruz. Counsel testified that she was "absolutely satisfied" that, through Lopez, Cruz advised her of his theory of the case and possible defenses and that she was able to convey the State's case to him, except for the State's technical scientific evidence. She testified that Cruz was able to assist in his own defense. Trial counsel made the trial court aware of her concerns regarding Cruz's level of comprehension.

Viewing these events from counsel's perspective in 1983, we conclude that trial counsel's representation was that which would have been provided by an ordinarily prudent lawyer under the same facts and circumstances. See *Harper*, 57 Wis.2d at 557, 205 N.W.2d at 9. Trial counsel investigated her concerns regarding Cruz's level of comprehension and took steps based upon that investigation designed to improve Cruz's comprehension. Trial counsel discharged her duty to investigate this matter. See *Hubert*, 181 Wis.2d at 343-44, 510 N.W.2d at 803.⁴ Trial counsel did not perform deficiently in the manner in which she responded to Cruz's hearing loss and other deficits.

Cruz contends that he is entitled to a new trial because he did not sufficiently understand the 1983 trial proceedings. Specifically, he argues that his inability to fully understand the proceedings violated his Sixth Amendment

⁴ Having concluded that trial counsel's representation was not deficient, we need not address Cruz's claim that he was prejudiced by counsel's representation. See *Strickland v. Washington*, 466 U.S. 668, 697 (1984).

rights to be meaningfully present at his own trial, assist in his own defense and confront the government's witnesses on cross-examination.⁵ Cruz also alleges that his Fifth and Fourteenth Amendment due process rights were violated because he lacked the capacity to understand the proceedings, consult with counsel or assist in the preparation of his defense.

We have already held that trial counsel took prudent and reasonable steps to address Cruz's disabilities insofar as they impacted on his ability to participate at trial and understand the proceedings. As part of the *Machner* hearing, the trial court found that "[trial counsel] really achieved a rather good level of communication with Michael Cruz" in preparing him to testify at trial, that the charged crimes were not complex and that Cruz had "a good opportunity to assert his defense, particularly with the skillful training given him by [trial counsel]."

A criminal defendant has a due process right to be meaningfully present at his or her trial. *United States v. Cirrincione*, 780 F.2d 620, 633 (7th Cir. 1985). For this right to have any meaning, the defendant must possess sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding. *Id.* (citing *Dusky v. United States*, 362 U.S. 402 (1962) (per curiam)).

In *Cirrincione*, one of the defendants claimed that the absence of an official interpreter at trial denied him procedural due process. *Id.* at 633. The Seventh Circuit Court of Appeals held that "a defendant in a criminal proceeding is denied due process when: (1) what is told him [or her] is incomprehensible; (2) the accuracy and scope of a translation at a hearing or trial is subject to great doubt; (3) the nature of the proceeding is not explained to him [or her] in a manner designed to ensure his [or her] full comprehension; or (4) a credible claim of incapacity to understand due to language difficulty is made and the district court fails to review the evidence and make appropriate findings of fact." *Id.* at 634. Even though *Cirrincione* was decided two years after Cruz was convicted, we conclude that even if these standards apply to this

⁵ Cruz also contends that his Sixth Amendment right to effective assistance of counsel was violated. However, we have already rejected that claim, and we will not address it further.

case, Cruz was not denied due process. The trial court's findings of fact regarding Cruz's level of comprehension and the assistance rendered by trial counsel lead us to conclude that Cruz was "meaningfully present" at his trial and that his due process rights were satisfied.

We turn to the *Cirrincione* factors. On the question of whether what Cruz was told as part of trial proceedings was incomprehensible, the record reveals that while Cruz testified at the 1992 *Machner* hearing that he could hear and understand "very little" of what his translator told him during the trial, at the start of his direct examination during the 1983 trial he stated he could hear the interpreter and understand what she was saying to him. Cruz then answered questions on direct and cross-examination, and the interpreter asked for an opportunity to repeat or clarify questions for Cruz as it became necessary. When this record is considered in conjunction with trial counsel's testimony that Cruz understood the case and participated in his defense, the first prong is not satisfied.

The second prong, whether the accuracy and scope of translation is subject to grave doubt, is also not satisfied on this record. The same translator used at trial was retained for purposes of the postconviction motion hearing nine years later because she was the interpreter who had the best communication with Cruz. During Cruz's trial testimony, the translator was admonished to be certain that she was relaying Cruz's answers and not modifying them. Cruz has not established the requisite level of doubt.

The third prong, whether the nature of the proceeding was explained to Cruz in a manner designed to ensure his comprehension, is also not supported in this record. Trial counsel testified that she explained the nature of the charges and the proceeding to Cruz in a simplified manner designed to ensure his understanding. Additionally, in an April 1983 evaluation of Cruz as part of the competency evaluation, a doctor opined that Cruz understood the charged crimes and had a general understanding of the possible consequences of being found guilty, along with a general understanding of the roles of the judge, prosecutor and defense counsel. Trial counsel was satisfied that Cruz knew the facts testified to by witnesses to the crime and police officers and that he was able to assist her in preparing his defense. While Cruz may not have comprehended every aspect of his trial, his

demonstrated level of comprehension was sufficient to preclude satisfaction of part three of the *Cirrincione* test.

Finally, Cruz has not satisfied the fourth prong of the *Cirrincione* test which requires that the trial court failed to make appropriate findings of fact when advised of a defendant's language difficulties. Here, accommodations were made at trial to permit translation.

Cruz contends that he was denied his constitutional right to an interpreter throughout trial because he was unable to understand much of what the interpreter said and because the interpreter was drafted to act as the court's official interpreter when another Spanish-speaking witness, Arturo Salcedo, testified. Without deciding whether a federal constitutional right to an interpreter exists, our supreme court held in *State v. Neave*, 117 Wis.2d 359, 365-66, 344 N.W.2d 181, 184 (1984), "that as a matter of judicial administration, and to avoid questions of effective assistance of counsel and questions of whether inability to reasonably understand testimony resulted in a loss of an effective right to cross-examination, ... [f]airness requires that such persons who may be defendants in our criminal courts have the assistance of interpreters where needed."

The trial court in this case found that trial counsel prepared Cruz for trial by using the interpreter to rehearse him for his testimony and to get his views of translated police reports and witness statements. Furthermore, trial counsel had access to the transcripts of the trial of Michael Cruz's brother, where Salcedo also testified. Salcedo testified at Michael's trial that Michael stabbed him in a fight. Michael testified that he did not stab Salcedo. In light of the steps trial counsel took to prepare Cruz to testify, her access to transcripts of Salcedo's previous testimony and her belief that Cruz understood all of the transaction witnesses, we conclude that the absence of an interpreter during Salcedo's testimony did not deny Cruz his right to confront or cross-examine Salcedo, assist in his own defense, consult with counsel or be meaningfully present at trial.

By the Court. — Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.